In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-602

GAY GURS, *Appellant*,

vs.

MARGOT W. GURS, *Appellee*.

Op Appeal from the Court of Appeal of the State of California, First Appellate District, Division Three, From Judgment of June 15, 1976 Which Judgment Became Final on August 12, 1976 When the Supreme Court of California Denied Hearing

MOTION TO DISMISS
For Lack of Jurisdiction Pursuant to Rule 16 Revised Supreme Court Rules

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Appellee submits this motion to show the Supreme Court of the United States that it has no jurisdiction to consider the appeal and there is no substantial federal question presented.

OPINION BELOW

The opinion of the Court of Appeal is not reported and will not be reported pursuant to the Order of the same Court, since the opinion carries a stamp "NOT TO BE PUBLISHED IN OFFICIAL REPORTS". Said Opinion is attached to the Jurisdictional Statement as Exhibit "A".

STATEMENT OF THE CASE

The complaint which forms the basis for this appeal was filed in the Superior Court of the State of California in and for the County of Monterey, Case No. M 7133 on August 12, 1975. Appellant (Plaintiff therein) sought equitable relief from a Judgment of Marital Dissolution entered May 17, 1972. That Judgment became final on July 16, 1972. Appellant alleged in his complaint that the Judgment dividing his military retirement pension as quasi-community property was unconstitutional because he was a non-resident of the State of California at the time the pension rights were earned. Appellee (Defendant therein) filed a demurrer to that complaint asserting the doctrine of res judicata as the matter had been conclusively decided in the earlier dissolution proceeding.

The Superior Court ordered the demurrer sustained without leave to amend on the ground of res judicata and entered Judgment of Dismissal nunc pro tunc as of October 17, 1975.

Notice of Appeal to the Court of Appeal was filed on November 12, 1975. The opinion concluded that the doctrine of res judicata was properly applied and affirmed the Superior Court's Judgment of Dismissal. The opinion also contains dicta which discusses and rejects Appellant's claim of un-constitutionality. Notice of Appeal was thereafter filed with this Court.

QUESTIONS PRESENTED

1. Does the doctrine of res judicata bar the re-litigation of the issue of the division of quasi-community property once a Marital Dissolution Judgment has become final.

2. If not, is there a substantial federal question concerning the constitutionality of Section 4803 of the California Civil Code.

ARGUMENT

Appellant ignores the doctrine of res judicata in his Jurisdictional Statement. Appellee submits that the doctrine is dispositive of the case in that the so-called federal question was neither timely nor properly raised.

The following facts are uncontroverted.

Appellee herein filed a Petition for Dissolution of Marriage in Monterey County, State of California, on August 23, 1971. Appellant herein filed a Response

to the Petition on or about November 12, 1971. Both Appellee and Appellant were residents of California at the time the Petition for Dissolution of Marriage was filed.

The Court, after the trial of the issues where both parties appeared and were represented by counsel, granted a Judgment on May 17, 1972 awarding, among items of community property, a fixed share of Appellant's military retirement to appellee.

Appellant did not appeal from the Judgment dissolving the marriage of the parties.

In August, 1975, Appellant herein filed an action against the Appellee in the Superior Court, Monterey County, alleging that at the time that Appellant's military retirement vested both Appellant and Appellee were residents of a non-community property state. A copy of said complaint is attached hereto as Exhibit "A".

Appellee demurred to the complaint on the ground that the issue presented by the complaint had been litigated in the prior action for dissolution of marriage in 1972.

The trial court sustained Appellee's demurrer to Appellant's complaint on the ground of res judicata, without leave to amend. Judgment of Dismissal was entered.

The Court of Appeal of the State of California, First Appellate District, Division Three, sustained the trial court's decision and affirmed the Judgment.

The Supreme Court of the State of California denied hearing on August 12, 1976.

It can be seen from the Complaint for Equitable Relief that there is no allegation of excuse, mistake or fraud. It is clear under California law that in these circumstances the doctrine of res judicata is a complete bar to the re-litigation. *Kulchar v. Kulchar,* 1 Cal.3d 467 (1969).

The Supreme Court of the State of California in its Opinion in *Kulchar,* supra, analyzes the doctrine of res judicata as it applies to the division of property rights in a dissolution case. It also enumerates the circumstances when the doctrine would not apply. Because of its appositeness to the instant fact situation it is attached hereto and marked Exhibit "B".

It should be emphasized that if a litigant has had a fair opportunity to present his case he will not be afforded equitable relief to set a final judgment. *Kulchar v. Kulchar,* supra.

The California Supreme Court restated the policy underlying the doctrine of res judicata in the recent case of *In re Crow,* 4 Cal.3d 613, 623 (1971).

> "The doctrine of res judicata in civil matters rests upon the sound policy of limiting litigation by preventing a party who has had one fair adversary hearing on an issue from again drawing it into controversy and subjecting the other party to further expense in its reexamination."

Thus, according to the settled California law, the time for raising the so-called federal question has

long since passed. The Judgment of Dissolution became properly final and there is no cause to un-do that decision.

The Opinion of the California Court of Appeal (Exhibit "A", Jurisdictional Statement) discusses and rejects Appellant's constitutional argument. Appellee submits that the discussion therein is dicta because Appellant has no standing to raise the issue due the direct estoppel of res judicata.

Notwithstanding that, the merits of Appellant's positions are discussed below.

The Fourteenth Amendment of the United States Constitution does not prohibit a state legislature from passing a law affecting the property rights of the citizens of that state, so long as the law bears a reasonable relationship to a legitimate state interest. *Smith v. King,* 277 F.Supp. 31, affirmed 88 S.Ct. 2128, 392 U.S. 309, 20 L.Ed.2d 1118; *Browden v. Gayle,* 142 F.Supp. 707, affirmed 77 S.Ct. 145, 352 U.S. 145, 1 L.Ed.2d 114; *McLaughlin v. State of Florida,* 85 S.Ct. 283, 379 U.S. 184, 13 L.Ed.2d 222, on remand 172 So.2d 640. Appellant does not dispute this long-standing principle of constitutional law.

Appellant argues that the protection of an "innocent" party to a divorce was the sole state interest upon which the Court in *Addison v. Addison,* 43 Cal. Rptr. 97, 399 P.2d 897 (1965) held California's quasi-community property statute (Civil Code Section 4803) constitutional, and that, therefore, the January 1, 1970 advent of "no-fault divorce" in California

renders this section unconstitutional. Appellant does not say why he should be allowed to here raise this contention which should have been advanced in his original action finalized in 1972.

Assuming for argument that Appellant's contention is timely and properly before this Court, Appellant's reading of *Addison,* supra, is erroneous. It is true that the *Addison,* supra, Court stated:

> "In the case at bar it was Leona who was granted a divorce from Morton on the ground of the latter's adultery and hence it is the spouse guilty of the marital infidelity from whom the otherwise separate property is sought by the operation of the quasi-community property legislation. We are of the opinion that where the innocent party would otherwise be left unprotected the state has a very substantial interest and one sufficient to provide for a fair and equitable distribution of the marital property without running afoul of the due process clause of the Fourteenth Amendment. For the same reasons sections 1 and 13 of article I of the California Constitution, substantially similar in language, are not here applicable."

By the time it uses this language, however, the Court has already reached the conclusion that the California legislature was acting in furtherance of the public interest in its adoption of Civil Code Section 4803, and this relied-upon interest is clearly broader than the singular plight of "innocent" plaintiff Leona Addison. To quote the Court:

> "It cannot be successfully argued that the quasi-community property legislation is unconstitu-

tional because of a violation of the due process clause of the federal Constitution. Morton has not been deprived of a vested right without due process. As Professor Armstrong has correctly pointed out in her article, supra: 'Vested rights, of course, may be impaired "with due process of law" under many circumstances. The State's inherent sovereign power includes the so called "police power" right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people. The annals of constitutional law are replete with decisions approving, as constitutionally proper, the impairing of, and even the complete confiscation of, property rights when compelling public interest justified it.

" '* * *

" 'The constitutional question, on principal, therefore, would seem to be, not whether a vested right is impaired by a marital property law change, but whether such a change reasonably would be believed to be sufficiently necessary to the public welfare as to justify the impairment.' (Armstrong, 'Prospective' Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity" (1945) supra, 33 Cal.L.Rev. 476, 495-496.)

"Clearly the interest of the state of the current domicile in the matrimonial property of the parties is substantial upon the dissolution of the marriage relationship. This was expressly recognized by the United States Supreme Court in *Williams v. State of North Carolina,* 317 U.S. 287 at p. 298, 63 S.Ct. 207, at p. 213, 87 L.Ed. 279,

where it was said. 'Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal.' "

Thus, Appellant's contention that in *Addison,* supra:

> ". . . the Court must have assumed that the male in a dissolution proceedings (sic) is *ipso facto* the guilty party" (Appellant's brief, pp. 8-9)

is erroneous, and the Civil Rights Act of 1964 is not violated.

Indeed, Appellant's privileges and immunities and equal protection arguments similarly grounded, also fall upon a correct reading of *Addison,* supra.

Since the *Addison* (supra) decision cited state interests broader than the protection of "innocent" parties as justification for California's quasi-community property statute, the validity of that ruling stands unaffected by the 1970 proclamation of "no-fault divorce" in California.

The opinion in *Addison v. Addison,* supra, and the statute providing for the division of quasi-community property, Section 4803 California Civil Code, were correctly analyzed the California Court of Appeal in the opinion in this case. See Exhibit "A", Jurisdictional Statement.

Therefore, Appellant brings before this Court no substantial federal question.

Respectfully submitted,
COMINOS, SHOSTAK & EPSTEIN,
By THEODORE H. COMINOS,
Attorneys for Appellee.

November 29, 1976.

(Exhibits Follow)

Exhibits

Exhibit "A"

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Superior Court of the State of California
County of Monterey

No. M 7133

Gay Gurs,
Plaintiff,
vs.
Margot W. Gurs,
Defendant.

[Filed Aug. 12, 1975]

COMPLAINT FOR EQUITABLE RELIEF

Plaintiff alleges:

I

Plaintiff is a retired major of the military forces of the United States and prior to 1963 he was a resident of the State of Ohio. Since early 1963 he has been a resident of the State of California.

II

The Defendant is the former wife of the Plaintiff, and prior to 1963 she was a resident of the State of Ohio. She has been a resident of the State of California since early 1963.

III

On or about June 12, 1939, Plaintiff enlisted in the Ohio National Guard in Cleveland, Ohio and Plaintiff's unit was federalized on October 15, 1940 and thereupon Plaintiff was inducted into the active military service in the United States Army.

IV

Plaintiff and Defendant were married in Evansville, Indiana on October 6, 1949, which marriage was dissolved by the Memorandum Decision of the Honorable Ralph M. Drummond, one of the Judges of the Superior Court of the State of California in and for Monterey County in case No. MDR2456, dated April 20, 1972. Said Judgment was amended by the Court on May 17, 1972.

V

On the dates hereinafter indicated he was stationed as a member of the armed forces as follows:

October, 1940 to April 1942	Camp Shelby, Mississippi
April, 1942 to June, 1942	Fort Belvoir, Virginia
June, 1942 to May, 1943	Camp Crowder, Missouri
May, 1943 to December, 1944	U.S. Army in Europe
December, 1944 to October, 1945	Geiger Field, Washington

October, 1945 to November, 1946	U.S. Army in Germany
November, 1946 to May, 1947	Geiger Field, Washington
May, 1947 to May, 1950	U.S. Army in Germany
May, 1950 to June, 1951	Fort Riley, Kansas
June, 1951 to July, 1952	U.S. Army in Germany
July, 1952 to January, 1954	Fort Lewis, Washington
January, 1954 to July, 1957	U.S. Army in Germany
July, 1957 to August, 1957	Fort Hamilton, New York
August, 1957 to June, 1959	Fort Ord, California
June, 1959 to July, 1962	U.S. Army in Germany
July, 1962 to December 31, 1962	Fort Ord, California

VI

Plaintiff retired from service at Fort Ord, California on December 31, 1962. His length of service with the armed forces covered the period of June 12, 1939 to December 31, 1962, or approximately 23½ years, credited 24 years for pay purposes by the Department of the Army. During that time he and his at the time wife, were physically present in the State of California twice. The first period from August 20, 1957 to June 5, 1959, that is one year and nine and one-half months. Their second and only other stay in California was from July 31, 1962 to December 31, 1962 or five (5) months. Their total stay in California while he was in the service with the U.S. Army was two years and two and one-half months, or approximately 1/11th parts of his total service career.

VII

As a citizen of the State of Ohio, Plaintiff received a bonus from his home state for World War II par-

ticipation in 1950. He also received a bonus from his home state in 1957 for the Korean Conflict. While he was a citizen of Ohio, he was qualified to receive said bonuses. However, he was not qualified and did not receive any bonus from the State of California.

VIII

Plaintiff has in his possession various documents attesting to the facts hereinabove stated and he also has in his possession a document indicating that his name was changed from Serge Gurs to Gay Gurs which the latter name he is presently known by.

IX

During 1971 while Plaintiff and Defendant resided in the State of California, the Defendant filed her Petition for a Dissolution of Marriage in the Superior Court of the State of California, Monterey County, Case No. MDR2456. The Court acquired jurisdiction of Plaintiff herein (Respondent in the Dissolution matter) on August 24, 1971 and Memorandum of Decision was entered and filed on April 20, 1972 in which the Honorable Ralph M. Drummond, one of the Judges of the Superior Court, granted an Interlocutory Judgment of Dissolution of Marriage to Petitioner in the Dissolution case (Defendant herein) and among others he found that the military retirement pay of Plaintiff herein was community property and awarded to Defendant herein (Petitioner in Dissolution) 32½ percent of said retirement pay and ordered that she should be given her share of 32½

percent within 10 days after Plaintiff received his monthly payments.

X

Subsequently the Honorable Ralph M. Drummond, aforesaid Judge of the Superior Court, amended the Judgment referred to above in accordance with his Order of May 17, 1972 and reduced the amount payable to Defendant herein (Petitioner in Dissolution) her share in the Plaintiff's retirement pay to 13/48th part thereof. Said payment was based on the finding of the Court that Plaintiff served in the armed forces 24 years and that the parties were married during that time thirteen (13) years and that Defendant (Petitioner in Dissolution) was entitled to one-half of 13/24th or 13/48th part of the retirement pay.

XI

Plaintiff submits that while his service with the armed forces of the United States lasted for a period of 24 years, and while the parties were married during that time for 13 years, however the time spent by Plaintiff in the State of California amounted only to two years and two and one-half months or approximately 1/11th part of his total military service.

XII

Plaintiff further submits to the Court and requests that the Court take judicial notice of the fact that while the State of California is a community property state, the State of Ohio, of which Petitioner was a citizen during his military service, is a common law

and a non-community property state and therefore the awarding to Defendant (Petitioner in dissolution) 13/48th part of Plaintiff's military retirement pay deprives him of due process and of the equal protection of law under the Constitution of the State of California as well as of the United States.

Plaintiff is deprived of substantive due process of law as well as of equal protection of the law since there is no sufficient close nexus with any underlining policy objective which would pass constitutional muster. Plaintiff further alleges that the granting to Defendant (Petitioner in the Dissolution case) 13/48th part of his military retirement pay based on the 13 year marriage of the parties, deprives him of substantive due process of law and of equal protection of the law since as a resident of a common law state at the time when the retirement pay becomes vested in him, Defendant would have been entitled only to 2.2/48th part of his retirement pay and granting her a larger share is not rationally related to a legislative objective that it can be used to deprive Plaintiff of his status as a resident of a common law state. Because of that Plaintiff alleges that the action of the Court here granting Defendant 13/48th part of his military retirement pay is so arbitrary as to violate the constitution of the United States and of the State of California pursuant to the due process clause and the clause pertaining to equal protection.

Plaintiff submits that said Order of May 17, 1972 in equity and good conscience ought to be corrected so that Defendant (Petitioner in Dissolution) be

awarded not 13/48th part but only 2.2/48th part of the monthly payments received by Plaintiff as his military retirement pay.

XIII

Plaintiff also submits to the Court and requests that the Court take judicial notice of the fact that the State of Ohio of which Plaintiff and Defendant herein were residents at the time when Plaintiff retired from military service judicially determined that military retirement pay is the separate property of the person earning it and further that the Court of the State of California by comity ought to and does recognize the holding of such sister state.

XIV

Plaintiff further submits to the Court that the Defendant herein is a well qualified person to provide for her own living expenses. That she is an instructor of the German language at the Defense Language Institute (DLI) Presidio of Monterey, where she is employed and classified as a GS-9 earning approximately $1,200.00 per month. That in addition thereto she receives other income amounting to approximately $300.00 per month, a total of $1,500.00 exclusive of any payment that the Superior Court of Monterey County ordered Plaintiff to pay her.

Plaintiff further submits that after he had retired from military service and subsequently thereto he became a Correctional Office in the State of California assigned to the California Correctional Training Facility at Soledad, California where he earns ap-

proximately the same amount as Defendant does in her employment.

XV

Plaintiff submits that in equity and good conscience he is entitled to a further Order that the Defendant (Petitioner in the Dissolution) reimburse Plaintiff for the amounts which she wrongfully received between May 17, 1972 and the time of the Order to be entered herein. However, Plaintiff is willing to abandon any such claim and ask the Court for the Order:

1. That the amount payable to Defendant as her share of Plaintiff's military retirement pay be reduced from 13/48th part thereof to 2.2/48th part thereof;

2. That costs be awarded to Plaintiff; and,

3. That the Court enter such other and further Order that equity requires.

Dated: August 11, 1975.

/s/ Gay Gurs
Gay Gurs, Plaintiff

Heisler, Stewart, Silver & Daniels
By: /s/ Francis Heisler
Francis Heisler
Attorney for Plaintiff

Verification

State of California
County of Monterey—ss.

I am the Plaintiff in the above-entitled action; I have read the foregoing Complaint for Equitable Relief and know the contents thereof; and I certify that the same is true and correct of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I, Gay Gurs, declare under penalty of perjury that the foregoing is true and correct.

Executed on August 11, 1975, at Carmel, California.

/s/ Gay Gurs
Gay Gurs

Exhibit "6"

[1 C.3d 467; 82 Cal.Rptr. 489, 462 P.2d 17]

In the Supreme Court
of the
State of California
In Bank

S. F. No. 22695

Betty Richwhite Kulchar,
Plaintiff and Appellant,
vs.
George Victor Kulchar,
Defendant and Respondent.

[Dec. 23, 1969]

OPINION

TRAYNOR, C. J.—Plaintiff appeals from an order of the Superior Court of San Mateo County modifying an interlocutory decree of divorce to relieve defendant of liability to pay federal income taxes assessed against the parties on income accruing to plaintiff in New Zealand.

Plaintiff secured an interlocutory decree of divorce from defendant on July 3, 1964. The decree included the disposition of the community and separate property of the parties.[1] The decree provided, in part: "Defendant shall indemnify and hold plaintiff free and harmless in the matter of any monies due any taxing agency, whether Federal, State or County, for the calendar years prior to 1964."

In 1966, following the divorce proceedings, defendant received a tax assessment of approximately $22,000 of federal income taxes based on theretofore undisclosed income accumulated during the marriage by a New Zealand corporation in plaintiff's name. Defendant moved to modify the divorce decree to relieve him of any liability for taxes on the New Zealand income on the grounds of extrinsic fraud and extrinsic mistake. After a hearing on defendant's motion, the trial court concluded that the tax provision in the decree "was included and approved by the parties as a result of the mutual mistake of the parties and further, that there was no intent of the parties that defendant should pay United States Federal income tax resulting from income to plaintiff in New Zealand." The court struck the tax provision from the decree "because of the mutual mistake of the parties."

Under certain circumstances a court, sitting in equity, can set aside or modify a valid final judgment. (*Olivera v. Grace* (1942) 19 Cal.2d 570, 575-576 [122 P.2d 564, 140 A.L.R. 1328]; *Caldwell v. Taylor* (1933)

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[1]There was no formal property settlement agreement. All provisions of the decree relating to the distribution of property were submitted to the court on the stipulation of the parties.

218 Cal. 471, 475 [23 P.2d 758, 88 A.L.R. 1194].) This power, however, can only be exercised when the circumstances of the case are sufficient to overcome the strong policy favoring the finality of judgments. "A basic requirement of an action which can lead to a valid judgment is that a procedure should be adopted which in the normal case will give to the parties an opportunity for a fair trial which is reasonable in view of the requirements of public policy in the particular type of case. If this requirement is met, a judgment awarded in an action is not void merely because the particular individual against whom it was rendered did not in fact have an opportunity to present his claim or defense before an impartial tribunal. . . . [P]ublic policy requires that only in exceptional circumstances should the consequences of res judicata be denied to a valid judgment." (Rest., Judgments, § 118, com. a.)

Interlocutory divorce decrees are res judicata as to all questions determined therein, including the property rights of the parties. (*In re Williams' Estate* (1950) 36 Cal.2d 289, 292 [233 P.2d 248, 22 A.L.R.2d 716]; *Adamson v. Adamson* (1962) 209 Cal.App.2d 492, 501 [26 Cal.Rptr. 236]. If a property settlement is incorporated in the divorce decree, the settlement is merged with the decree and becomes the final judicial determination of the property rights of the parties. (*Broome v. Broome* (1951) 104 Cal.App.2d 148, 154-155 [231 P.2d 171].) Thus, the rules governing extrinsic fraud and mistake apply to alimony awards and property settlements incorporated in divorce de-

crees. (*Jorgensen v. Jorgensen* (1948) 32 Cal.2d 13, 18-23 [193 P.2d 728]; *Cameron v. Cameron* (1948) 88 Cal.App.2d 585, 595-597 [199 P.2d 443]; *Hosner v. Skelly* (1946) 72 Cal.App.2d 457, 461 [164 P.2d 573]; *Horton v. Horton* (1941) 18 Cal.2d 579, 584-585 [116 P.2d 605]; *Hendricks v. Hendricks* (1932) 216 Cal. 321, 323-324 [14 P.2d 83]; *Godfrey v. Godfrey* (1939) 30 Cal.App.2d 370, 378-380 [86 P.2d 357]; *Smith v. Smith* (1954) 125 Cal.App.2d 154, 161-164 [270 P.2d 613].)

Extrinsic fraud usually arises when a party is denied a fair adversary hearing because he has been "deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense." (3 Witkin, Cal. Procedure, p. 2124.) "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the cast of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing." (*United*

States v. Throckmorton (1878) 98 U.S. 61, 65-66 [25 L.Ed. 93, 95].)

The right to relief has also been extended to cases involving extrinsic mistake. (*Bacon v. Bacon* (1907) 150 Cal. 477, 491-492 [89 P. 317]; *Olivera v. Grace, supra,* at p. 577.) "In some cases . . . the ground of relief is not so much the fraud or other misconduct of the defendant as it is the excusable neglect of the plaintiff to appear and present his claim or defense. If such neglect results in an unjust judgment, *without a fair adversary hearing,* the basis for equitable relief is present, and is often called 'extrinsic mistake.'" (3 Witkin, Cal. Procedure, p. 2128.)

Extrinsic mistake is found when a party becomes incompetent but no guardian ad litem is appointed (*Olivera v. Grace, supra,* at p. 577; *Dei Tos v. Dei Tos* (1951) 105 Cal.App.2d 81, 84-85 [232 P.2d 873]; *Winslow v. McCarthy* (1918) 39 Cal.App. 337, 340 [178 P. 720]; when one party relies on another to defend (*Weitz v. Yankoski* (1966) 63 Cal.2d 849, 855-856 [48 Cal.Rptr. 620, 409 P.2d 700]; *Roussey v. Ernest W. Hahn, Inc.* (1967) 251 Cal.App.2d 251, 256 [59 Cal.Rptr. 399]); when there is reliance on an attorney who becomes incapacitated to act (*Jeffords v. Young* (1929) 98 Cal.App. 400, 405-406 [277 P. 163]; *Smith v. Busniewski* (1952) 115 Cal.App.2d 124, 127-128 [251 P.2d 697]; *Antonsen v. Pacific Container Co.* (1941) 48 Cal.App.2d 535, 538 [120 P.2d 148]), when a mistake led a court to do what it never intended (*Sullivan v. Lumsden* (1897) 118 Cal. 664, 669 [50 P. 777]; *Bacon v. Bacon, supra,* at pp. 492-493); when

a mistaken belief of one party prevented proper notice of the action (*Aldabe v. Aldabe* (1962) 209 Cal. App.2d 453, 475 [26 Cal.Rptr. 208]; *Boyle v. Boyle* (1929) 97 Cal.App. 703, 706 [276 P. 118]; or when the complaining party was disabled at the time the judgment was entered (*Watson v. Watson* (1958) 161 Cal.App.2d 35, 39-49 [325 P.2d 1011]; *Saunders v. Saunders* (1958) 157 Cal.App.2d 67, 72-73 [320 P.2d 131]; *Evry v. Tremble* (1957) 154 Cal.App.2d 444, 447-449 [316 P.2d 49]). Relief has also been extended to cases involving negligence of a party's attorney in not properly filing an answer (*Hallett v. Slaughter* (1943) 22 Cal.2d 552, 556-557 [140 P.2d 3]; *Turner v. Allen* (1961) 189 Cal.App.2d 753, 757-760 [11 Cal. Rptr. 630]); and mistaken belief as to immunity from suit (*Bartell v. Johnson* (1943) 60 Cal.App.2d 432, 436-437 [140 P.2d 878]).[2]

Relief is denied, however, if a party has been given notice of an action and has not been prevented from participating therein. He has had an opportunity to present his case to the court and to protect himself from mistake or from any fraud attempted by his adversary. (*Jorgenson v. Jorgenson, supra,* 32 Cal.2d 13 at p. 18; *Westphal v. Westphal* (1942) 20 Cal.2d 393, 397 [126 P.2d 105]; *Gale v. Witt* (1948) 31 Cal.

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[2]The decisions in both *Hallett* and *Bartell* have been criticized. (See Comment (1943) 31 Cal.L.Rev. 600.) "The cases on *intrinsic fraud,* involving perjury, false documents and other reprehensible conduct by the adverse party, are far more compelling, yet relief is uniformly denied for good reason. . . . The *Hallett* and *Bartell* cases involve no true extrinsic factors in the accepted sense, and they raise serious questions as to the practical finality of any default judgment." (3 Witkin, Cal. Procedure, p. 2130.)

2d 362, 367 [188 P.2d 755]). Moreover, a mutual mistake that might be sufficient to set aside a contract is not sufficient to set aside a final judgment. The principles of res judicata demand that the parties present their entire case in one proceeding. "Public policy requires that pressure be brought upon litigants to use great care in preparing cases for trial and in ascertaining all the facts. A rule which would permit the re-opening of cases previously decided because of error or ignorance during the progress of the trial would in a large measure vitiate the effects of the rules of res judicata." (Rest., Judgments, § 126, com. a.) Courts deny relief, therefore, when the fraud or mistake is "intrinsic"; that is, when it "goes to the merits of the prior proceedings, which should have been guarded against by the plaintiff at that time." (Comment, *Equitable Relief From Judgments, Orders and Decrees Obtained by Fraud* (1934) 23 Cal.L.Rev. 79, 83-84; see *Pico v. Cohn* (1891) 91 Cal. 129, 134 [27 P. 537, 25 Am.St.Rep. 159, 13 L.R.A. 336]; *Hendricks v. Hendricks, supra,* at pp. 323-324.)

Relief is also denied when the complaining party has contributed to the fraud or mistake giving rise to the judgment thus obtained. *(Hammell v. Britton* (1941) 19 Cal.2d 72, 80 [119 P.2d 333]; *Rudy v. Slotwinsky* (1925) 73 Cal.App. 459, 465 [238 P. 783]; Rest. Judgments, § 129.) "If the complainant was guilty of negligence in permitting the fraud to be practiced or the mistake to occur equity will deny relief." *(Wilson v. Wilson* (1942) 55 Cal.App.2d 421, 427 [130 P.2d 782].)

Whether the case involves intrinsic or extrinsic fraud or mistake is not determined abstractly. "It is necessary to examine the facts in the light of the policy that a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he was deprived of a fair opportunity fully to present his case." *(Jorgensen v. Jorgensen, supra,* 32 Cal.2d 13 at p. 19.)

The evidence in the present case establishes that it is a case in which a party "failed to assemble all his evidence at the trial." Defendant testified that he knew of the New Zealand holdings prior to the divorce and that plaintiff was receiving $640 every four months from New Zealand. In defendant's divorce questionnaire, circulated to determine the extent of marital property holdings, expenses and income, he listed as plaintiff's separate property "50% stock interest in David Lloyd Co., Ltd.—a New Zealand holding corporation for many subsidiary companies (cement, coal, paper)—exact worth unknown to defendant—estimate to run into millions of dollars." In a letter sent by defendant's attorney to plaintiff's attorney in which the principal points of the property settlement were summarized, defendant proposed to transfer to plaintiff "any interest he may have in her holdings in New Zealand." Plaintiff also knew of the holdings but did not know of their value or their tax consequences. In 1957 when preparing income tax returns, an attorney, who later represented defendant

in the divorce action, made some inquiry into the nature of the New Zealand income at the request of defendant. The attorney abandoned further investigation after plaintiff stated that a law firm known to defendant's attorney had advised her that the New Zealand income was not taxable. The attorney knew that the New Zealand holdings were "sizable." Both parties testified that the tax provision was included in the decree because of an audit being conducted by the Internal Revenue Service with respect to an unrelated transaction by defendant.

Clearly the present case does not involve the failure of one spouse to disclose fully the assets to be divided upon separation. (See *Taylor v. Taylor* (1923) 192 Cal. 71 [218 P. 756, 51 A.L.R. 1074]; *Milekovich v. Quinn* (1919) 40 Cal.App. 537 [181 P.2d 256]. The duty to disclose arises out of the fiduciary relationship between the husband and wife. *(Vai v. Bank of America* (1961) 56 Cal.2d 329, 337-340 [15 Cal.Rptr. 71, 364 P.2d 247]; *Jorgensen v. Jorgensen, supra,* 32 Cal.2d 13 at pp. 19-21.) There is no evidence that the wife withheld any information relevant to the nature of her New Zealand income.

The factual situation in the present case is analogous to that in *Jorgensen v. Jorgensen, supra.* In *Jorgensen* the husband disclosed all known assets of the parties. The husband claimed certain assets as his separate property. The wife and her attorney accepted the husband's statements at face value without any independent investigation. Subsequent to the divorce decree, however, they learned that some of the

assets the husband claimed as separate property were actually community property, in which the wife was entitled to a one-half interest. The wife was denied the right to set aside the property settlement agreement. "If the wife and her attorney are satisfied with the husband's classification of the property as separate or community, the wife cannot reasonably contend that fraud was committed or that there was such mistake as to allow her to overcome the finality of a judgment. . . . Plaintiff is barred from obtaining equitable relief by her admission that she and her attorney did not investigate the facts, choosing instead to rely on the statements of the husband as to what part of the disclosed property was community property." *(Jorgensen v. Jorgensen, supra,* 32 Cal.2d 13 at pp. 22-23; see also, *Cameron v. Cameron, supra,* 88 Cal.App.2d 585 at pp. 595-597 wherein the holding of *Jorgensen* was found controlling.)

In the present case both parties knew of the New Zealand assets, but the husband and his attorney chose not to investigate their taxability. The property settlement agreement expressly covered unknown tax liability. Having had full opportunity to consider all income of the wife and its concurrent tax consequences, the husband cannot now complain of the added tax burden.

The order is reversed.

Peters, J., Torbriner, J., Mosk, J., Burke, J., and Sullivan, J., concurred.

McComb, J.—I dissent I would affirm the order of the trial court.